

Nutrient Trading Expansion Regulatory Advisory Panel – Meeting #1
Wednesday, November 14, 2012
Richmond, Virginia

Regulatory Advisory Panel Members Present

Philip Abraham, Virginia Association of Commercial Real Estate
Doug Beisch, Williamsburg Environmental Group, Inc.
Jack Frye, Chesapeake Bay Commission
Brent Fults, Chesapeake Bay Nutrient Land Trust, LLC
S. Taylor Goodman, Balzer and Associates, Inc.
Normand Goulet, Northern Virginia Regional Commission
Steve Herzog, Hanover County
Ann Jennings, Chesapeake Bay Foundation
Whitney S, Katchmark, Hampton Roads Planning District Commission
Joseph H. Maroon, Maroon Consulting
Adam Meurer, ECS Mid-Atlantic, LLC
Chris Pomeroy, VAMSA
Mindy Selman, World Resources Institute
Wilmer Stoneman, Virginia Farm Bureau Federation
Jack Storton, BWX Technologies
Shannon Varner, Troutman Sanders LLP
Brian Wagner, Ecosystem Services, LLC

Facilitator

Kristina Weaver, Institute for Environmental Negotiations
Peter Guzman, Institute for Environmental Negotiations

Agency Staff Present

Emilee Adamson, DEQ
David Aho, DCR
Russ Baxter, DEQ
Diane Beyer, DCR
Allen Brockenbrough, DEQ
Scott Crafton, DCR
David Dowling, DCR
Michael Fletcher, DCR
Doug Fritz, DCR
Debra Harris, DEQ
Buck Kline, DOF
Darrell Marshall, VDACS
Stephanie Martin, DCR

Ginny Snead, DCR
Michelle Vucci, DCR
Matthew Gooch, Office of the Attorney General

Others Present

Scott Blossom, Williamsburg Environmental Group
John Fowler, Chesapeake Bay Foundation
Rick Parrish, Southern Environmental Law Center

Ms. Snead welcomed attendees to the meeting and thanked them for being willing to participate in the regulatory process.

Regulatory Action Overview, Committee Charge and Regulatory Timeline

Ms. Snead gave the regulatory overview. A full copy of the handout provided to RAP members is available from DCR and is also available at:
http://www.dcr.virginia.gov/laws_and_regulations/lr6.shtml.

Brief Background

Chapters 748 (HB176) and 808 (SB77) of the 2012 Virginia Acts of Assembly established the Nutrient Trading Act [Article 1.1:1 of Title 10.1 (§10.1-603.15:1 et seq.)] which requires the Virginia Soil and Water Conservation Board to adopt regulations related to Nutrient Credit Certification.

Specifically, §10.1-603.15:2 A. requires the Virginia Soil and Water Conservation Board (Board) to: “*adopt regulations for the purpose of establishing statewide procedures for the certification by the Board of nutrient credits other than (i) point source nitrogen and point source phosphorus credits generated by point sources covered by the general permit issued pursuant to §62.1-44.19:14 and (ii) nutrient credits certified by the State Water Control Board and the Department of Environmental Quality pursuant to §61.1-44-19:20.*”

Purpose of the RAP

The purpose of this regulatory action is to develop procedures in accordance with §10.1-603.15:2 of the Code of Virginia, in the form of regulations, through which nonpoint nutrient credits may be certified and registered.

Framework of Stormwater Regulations

- This action will establish new Nutrient Trading Certification Regulations (4VAC50-80-10 et seq.) that shall govern the certification of certain nutrient credits.

- The action may also require revisions to the Stormwater Management regulations (4 VAC 50-60) related to nutrient credit use and additional off-site options for construction activities pursuant to § 10.1-603.8:1.
- Pursuant to §10-603.15:2 B9, the action may also include but not be limited to language that addresses other components of Article 1.1:1 in Chapter 6 of Title 10.1 or Article 1.1 in Chapter 6 of Title 10.1 (the Stormwater Management Act) as deemed necessary.
- As needed, the action may also include the development of necessary forms and may include documents incorporated by reference.

Regulatory Amendment Process

- Regulatory actions are typically comprised of three primary steps: the Notice of Intended Regulatory Action, the Proposed Regulations, and the Final Regulations. As this regulatory action is not exempt, it will follow the full regulatory development process. Routinely under the Administrative Process Act (APA) this takes about 2 years.

Regulatory Timeline

Ms. Snead reviewed the regulatory timeline. A copy of this tentative timeline is available from DCR. She noted that the Virginia Soil and Water Conservation Board authorized and directed the filing of a Notice of Intended Regulatory Action (NOIRA) on June 28, 2012. The intent is to work through the regulatory process and that the final regulations would be published between August 8, 2014 and October 8, 2014, following appropriate reviews and public comment.

Regulatory Advisory Pane (RAP) Charge

- The purpose of the panel is to assist in developing nutrient trading certification regulations. This panel has been formed to help the Department and the Board balance the thoughts and concerns of all those interested in this regulatory action. All such thoughts and concerns will be addressed by the panel, and any panel member is free to advance any opinion.
- The role of the panel is advisory. The panel's primary responsibility is to collaboratively contribute to a regulation that is the best interests of the Commonwealth as a whole and that is compliant with state and federal law.
- The panel's goal is to reach a consensus on these regulations and make recommendations to the Department and Board. For the purposes of this RAP, consensus is generally defined as a willingness of each member of a panel to be able to say that he or she can live with the decisions reached and will not actively work against them outside of the process.

- This is not to say that everyone will be completely satisfied with the results of the process. It is necessary, however; that each participant come prepared to negotiate in good faith around complex and sensitive issues. Also, because the panel represents many different interests, all members should expect to compromise in order to accomplish the group's mission. If the group cannot reach consensus, the Department staff will advance as a recommendation what it views is the best balanced regulation but will present the differing opinions to the Board.
- Voting, per se, is contrary to a consensus-based process, but people may be asked to demonstrate their strength of feeling for or against a particular idea, and may be asked to help set priorities during the course of the process.

General Discussion on Consensus and Rules

Ms. Weaver reviewed general rules for discussion. She asked if members had concerns about consensus.

A member asked if someone noted that they could not accept a particular issue but that the issue remained as written would that be acknowledged.

Ms. Snead said that the Board would be informed if there was no consensus on a particular issue.

Ms. Jennings asked about the makeup of the RAP and whether consideration had been given to involve EPA in the process.

Mr. Dowling said that EPA and USDA are aware of the issues and that staff had been in conversation with them. He said that the makeup of the RAP was primarily technical experts. He noted that EPA and USDA were aware of the process.

Mr. Baxter said that DEQ and DCR participate in the trading and offsets workgroup with the Bay Program. He said that regular updates were provided to EPA.

Background on the Commonwealth's Programs

Mr. Baxter of DEQ gave a presentation regarding the Commonwealth's Programs. Mr. Baxter noted that many, but not all of the RAP members had been involved with the issue for some time. He said that his presentation was designed so that the RAP could have a common starting point for discussion.

The Use of Nutrient Credits in Virginia

Overview of Existing Programs

- Significant Point Source Trading and Stormwater Offsets

What's a Credit in Virginia?

- “Point source nitrogen (or phosphorus) credit” means the difference between (i) the waste load allocation for a permitted facility specified on annual mass load of total nitrogen, and (ii) the monitored annual mass load of total nitrogen discharged by that facility, where clause (ii) is less than clause (i), and where the difference is adjusted by the applicable delivery factor and expressed as pounds per year of delivered total nitrogen load.”
- “Nonpoint nutrient offset” means nutrient reductions certified as nonpoint nutrient offsets under the Chesapeake Bay Watershed Nutrient Exchange Program (§ 62.1 – 44.19:12 et seq.)

“Nutrient Trading Regulation”

General VPDES Watershed Permit for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Bay Watershed in Virginia (9 VAC 25-820-10)

(James, York, Rappahannock, Potomac/Shenandoah, Eastern Shore)

Chesapeake Bay Watershed General Permit: Key Features

- Calendar year annual total Nitrogen and total Phosphorus load limits (“caps”) for facilities and river basins based on a policy of “stringent treatment at design capacity.”
- Presumed that point source credits will eventually disappear as facilities reach capacity.
- Point Source-to-Point Source trading for existing facilities to meet load cap for each covered facility and each basin
- Point Source-to-Nonpoint Source trading reserved to accommodate new and expanding facilities that must offset entire load
- Approximately 165 facilities registered under the permit
- Trading confined to major basins except for Eastern Shore

Nutrient Credit Exchange Association

VA Nutrient Credit Exchange Association

<http://www.theexchangeassociation.org>

- Voluntary membership in non-stock Corporation created by General Assembly to facilitate the trading program.

- 105 facility members
- Facilitates trades, compliance
- Sets prices for credits among its members

Using Credits to Meet Stormwater Requirements (“offsets”)

10.1 – 603.8:1 Stormwater nonpoint nutrient offsets.

B.B. A VSMP authority is authorized to allow compliance with stormwater nonpoint nutrient runoff water quality criteria established pursuant to § 10.1-6-3.4, in whole or in part, through the use of the applicant’s acquisition of nutrient credits in the same tributary.
H. ...use credits certified as perpetual credits pursuant to Article 1.1:1 (§10.1 – 603.15:1 et seq.).

Transactions to Date – Point Source

Point Source to Point Source (DEQ)

- Credits Purchased 629,587 lbs of Nitrogen and 145,283 lbs of Phosphorus
- Credits Used 272, 824 lbs of Nitrogen and 78,891 lbs of Phosphorus
- 32 of 107 exchange members have purchased credits
- 3 non-exchange members have acquired credits from other non-exchange members

Expanding the Use of Nutrient Credits in Virginia

Chesapeake Bay TMDL Phase I Watershed Implementation Plan (WIP)

- Called for Study of Nutrient Credit Exchange to determine whether expansion would be beneficial to WIP implementation
- Key issues for review by the study committee identified in WIP
- General Assembly adopted SJR 334 which called on Secretary of Natural Resources to study expansion and report in 2012

Nutrient Credit Act – Key Provisions

1. Credit Evaluation and Certification
 - Clear Regulatory Authority granted to DCR for certifying nonpoint source credits from traditional or nontraditional practices
 - DEQ continues to certify point sources and operate existing trading program under the watershed general permit
 - Regulations to establish process for submittal, approval of credits
 - Enforcement and penalties prescribed
 - Certified Credits could be “perpetual” or “term”; code establishes uses

- Credits may be “bundled” for sale
- Virginia Nutrient Credit Registry created: Only certified credits on the registry; only credits on the registry may be used to meet permit requirements.

Expansion Framework

2. New Credit Uses

- Wastewater: Existing law and permit requirements remain in place; new and expanding facilities may use certified credits.
- Stormwater:
 - Existing Construction offset program remains in place
 - MS4 may acquire credits for compliance from point sources or nonpoint source
 - MS4’s may collectively meet allocations through voluntary partnerships
- Other Sources/purchasers:
 - Industrial Stormwater, CAFO
 - Unregulated entities

Use of compliance credits contingent on waste load allocations or load reductions assigned in permits and such use to approval by relevant Board or Agency

3. Baselines

Baselines will be established by regulation based on this statutory guidance:

Urban: Comply with VSMP regulations and level of effort for urban lands contained in the TMDL Phase I WIP

Agriculture: Level of Effort contained in the TMDL Phase I WIP

Land Conversion: Based on pre-conversion land use and WIP level of reductions for that land use

Other practices: Determined by relevant agency

4. Additional elements

- Financial assurance required
- Conversion of wetland and stream banks to nutrient possible (no ability to sell both types)
- 5% of registered credits “retired” for water quality improvement
- Reporting requirements established

Local Water Quality Provisions

- Stormwater Offsets: “No applicant shall use nutrient credits...in contravention of local water quality based limitations...”
- Watershed General Permit: “This section shall not be construed to limit or otherwise affect the Board’s authority to establish and enforce more stringent water quality-based effluent limitations for total nitrogen or total phosphorus in individual permits where those limitations are necessary to protect local water quality. The exchange or acquisition of credits pursuant to this article shall not affect any requirement to comply with such local water quality-based limitations.”
- Nutrient Trading Act:
 - Regulations shall “provide the option to acquire nutrient credit for compliance purposes shall not eliminate any requirements to comply with local water quality requirements.”
 - “This section shall not...limit or otherwise affect...the authority to establish and enforce more stringent water quality based limitation...where those limitations are necessary to protect local water quality.”
 - “The exchange or acquisition of credits...shall not affect any requirement to comply with such local water quality-based limitations”

Summary of Policy

- Use of credits tied to permits with associated oversight and enforcement
- Permanent impact requires permanent credit
- Rigorous baselines (tied directly to WIP/TMDL levels of effort)
- 5% of certified credits are retired for water quality improvement
- Establishment of public/transparent credit registry: Only registered credits will be available for sale and to meet permit requirements
- Clear certification procedures to be established by regulation
- Public notice of plans for credit use and establishment of proposed credit-generating facility
- Regulatory establishment of operation and maintenance, financial assurance, and other requirements
- Agency or Regulatory Board approval of use of credits for compliance
- Statutory protections for local water quality

Mr. Fults noted that a lot had been said about the Bay area, but that there was interest in the other watersheds.

Mr. Baxter said that the General Assembly had authorized DCR to establish a statewide program for nutrient credits.

Current Credit Approval Programmatic Procedures

Mr. Brockenbrough gave the following presentation.

Nonpoint source Nutrient Ban Permitting in Virginia

Legislative Findings and Purposes

General Assembly finds and determines that adoption and utilization of a watershed general permit and market-based point source nutrient credit trading program will assist in:

- a) meeting the nutrient cap load allocations cost-effectively and as soon as possible in keeping with the 2012 timeline and objectives of the Chesapeake 2000 agreement.
- b) accommodating continued growth and economic development in the Chesapeake Bay watershed, and
- c) providing a foundation for establishing market-based incentives to help achieve the Chesapeake Bay Program's nonpoint source reduction goals.

New and Expanded Facilities

- Any new or expanded discharge $\geq 40,000$ gpd after 7/1/05 must acquire waste load allocations sufficient to offset any increase in delivered loads and meet the appropriate technology requirement.
- Allocations must be acquired by...
 - a) From one or more permitted facilities in the same tributary
 - b) Acquisition of NPS load allocations through the use of BMPs. BMPs must exceed baseline threshold and be included in the individual VPDES permit.
 - c) Allocations purchased from the Water Quality Improvement Fund
 - d) Other means as approved by DEQ on a case-by-case basis

Nonpoint Source Load Offset Provisions

Special provisions for acquisition of non-point source load allocations through the use of BMPs:

- Work through a public or private entity
- BMPs must achieve reductions beyond those required by or funded under federal or state law, or the VA tributary strategies plans
- Included as conditions in the individual VPDES permit.
- Aggregators may serve as nutrient banks.

Phase I: Planning Your Trade

- Step 1: Assess progress toward baseline
- Step 2: Calculate potential offsets
- Step 3: Identify an offset broker

Phase II: Implementing Your Trade

- Step 4: Achieve and verify baseline requirements
- Step 5: Qualify offset project
- Step 6: Implement project
- Step 7: Authenticate offsets and trade

Ag Baseline BMP Requirements

Implementation of...

- Soil Conservation Plan
- Nutrient Management Plans
- Cover Crops
- Livestock Stream Exclusion w/35' buffer
- 35' Riparian buffer

Baseline requirements apply to entire FSA Tract

Mr. Beisch asked if this requirement was still in unpublished guidance.

Mr. Brockenbrough said that he would have to verify whether or not that was in the manual.

Mr. Fults said that it would be helpful to have an extended discussion regarding this topic. He said that FSA tracts were complicated.

Mr. Brockenbrough said that the idea was that the farmer would apply baseline requirements to entire farming operation and not just make an improvement on one field.

Ag BMP Enhancements to Generate Credits

Implementation of...

- Soil Conservation Plan – Continuous No-Till
- Nutrient Management Plans – 15% N reduction on corn
- Cover Crops – Early planting date

- Livestock Stream Exclusion w/35' buffer – Increase size
- 35' Riparian buffer – Increase size
- Land Conversion

It takes a lot of acreage to create a meaningful offset.

Ms. Jennings asked if the projects were under permanent conservation easements.

Mr. Brockenbrough said there were no restrictive covenants attached to the deed. He said that he could provide copies of the plans if requested. He noted that part of the change in the Code called for DCR to develop a registry. This will be developed over the next couple of years.

Mr. Frye asked if there would be discussion regarding how DCR would receive input for the registry and how the issue of transparency would be addressed.

Ms. Snead said that would be discussed later in this meeting when she reviewed the issues identified.

Ms. Jennings asked if lands converted from agriculture to forest were allowed to be timbered.

Mr. Brockenbrough said that the watershed model included all stages of forest cover but that timbered forest would have to be restored.

Current DEQ/DCR Processing

- Initial site visit
 - Establish land use as of July 1, 2005 – can be difficult
 - Establish baseline requirements for FSA tract
- Trees planted and formal Nutrient Reduction Plan submitted
 - Management practices and baseline documentation
 - Forest Stewardship Plan
 - Restrictive Covenants for land conversion
 - Financial Assurance (CD, Letter of Credit or Bond)
 - Calculation of TP and TN offsets generated
 - Reporting Procedures
- DCR issues recommendation letter
- DEQ issues Nutrient Reduction Certificate
- Credits released for sale upon completing any conditions of approval (financial assurance, covenants recorded, etc.)

Ms. Jennings asked if the Department of Forestry was involved in the stewardship plan. She also asked how long projects were monitored.

Mr. Brockenbrough said that plans can be prepared by state foresters. He said that he did not have a definitive timeframe for monitoring but noted that once the property begins natural succession as forest land it's is considered established.

Ms. Jennings asked what happened if the deed restriction was lost and the property was developed.

Mr. Brockenbrough said that would be considered a failure of the program. He said that the deed restriction cannot be removed without written approval from DCR and DEQ.

Mr. Fults said that there were sections of the Code that dealt directly with forest activity. He said it would be helpful to review and see if the sections overlap.

It was suggested a presentation from the Department of Forestry might be helpful.

At this time the committee recessed for lunch.

Overview of Issues Identified by DCR/DEQ Staff

Ms. Snead said that she would review the issues of concern as determined by staff and then open the discussion for comments from members. She said the purpose was not to discuss the issues in detail but to identify potential issues for future discussion. She said that she would also review the draft work plan.

Ms. Snead said that while it might be redundant it would be beneficial to review what the Act says. She turned to the handout containing Chapter 748 of the 2012 Acts of Assembly. A copy of this document is available ~~DCR~~ at:
http://www.dcr.virginia.gov/laws_and_regulations/lr6.shtml.

Ms. Snead turned to section 10.1-603.15:1 concerning definitions. She said that she would like to review the Act and note what the RAP would be reviewing.

Ms. Snead noted that Mr. Brockenbrough reviewed the current procedures that are use in the certification program, but the task was to incorporate these into the regulations.

Under certifying credits Ms. Snead said that bundling needed to be defined.

Under procedures Ms. Snead said that the RAP would need to discuss the baseline for each of the various sectors.

It was noted that the RMP plan is statewide, not just for the Chesapeake Bay Area.

A member asked about the reference to time of certification. He noted that the regulations could not be changed with the plans. That issue was placed in the “parking lot” for further discussion at a later time.

Ms. Snead said there needed to be determination regarding whether a technical committee was needed for evaluation purposes.

Mr. Baxter said that it was important that the Regulation reflect the provisions of the Code.

Mr. Frye noted that the current DEQ guidelines pertaining to non point credits were just guidelines and that the question was whether these guidelines become part of the regulations.

Mr. Baxter noted the difficulty in changing the regulations. He said that some items may need to be incorporated by reference and not a part of the actual regulation.

Mr. Beisch said that with regard to some of the practices, it was difficult to be specific in terms of efficiencies. He said the reference could be to the standards that are under development.

Ms. Snead reviewed the section regarding enforcement and penalties.

Mr. Fults asked if there was a master state list of definitions.

Ms. Snead said that staff was cross checking definitions with other statutes and regulations. She said that the first section of these regulations would likely contain additional definitions not found elsewhere.

RAP Identification of Issues

Ms. Weaver led a discussion of issues.

Mr. Maroon said there should be a discussion of verification for credits. He said that, unlike point sources, the issue was the giving up of the predictability of what the technology would accomplish.

Mr. Beisch said there should be a discussion of local water quality limitations on trading. There should be a simplified process so that there is more certainty on behalf of bankers and regulated entities.

Mr. Fults said that where credits would be traded needed to be clarified. He said that he did not believe there was a statewide willingness to comply with the law.

Ms. Jennings said there needs to be a greater level of transparency with local water quality issues. We said that when the non-traditional practices were evaluated there needed to be clear understanding of the implications.

Ms. Katchmark said that it would help to clarify the role of local government with MS4 permits. She said there was a question of whether MS4s would have to meet the WIP requirements in full.

Ms. Snead said that was to be decided. The question is: over the course of the permit cycle, if the MS4 met the WIP requirements in that permit cycle, would the MS4 be eligible for additional trading.

Ms. Katchmark asked if MS4s could use temporary credits.

Mr. Baxter said that could work for an MS4. He said that an MS4 or another urban area might need the ability to use credits that were not permanent.

Mr. Beisch said it would be beneficial for the nutrient certification program to have a process similar to wetland streams. He said that bankers are not inclined to spend a significant amount of money before they get certification.

Mr. Frye said that it was not clear how the law did or did not address the cost of the program and how things are paid for. He noted that this kind of offsetting was not a spending reduction.

Mr. Baxter said there was a statutory cap on what the permit fee could be.

Mr. Fults said that the fee should be substantial to provide the state the ability to review the project. He noted that the law calls for a 6% fee to be paid by the bankers to the state.

Mr. Baxter said the rationale was that there was significant state effort at the beginning of the process.

Mr. Simpson asked if only the farmer's portion could be cost share.

Mr. Baxter said the provision was a carryover from the existing law that said practices paid for by state or federal funds cannot be used to establish credits.

Mr. Beisch said the issue of cost share should involve a discussion of accounting practices.

Mr. Goulet said the discussion of credit calculations and procedures would be an evolving process.

Ms. Snead said that was the reason she was suggesting a technical subcommittee.

Mr. Maroon said that the RAP should be mindful of the fact that the EPA was developing technical memoranda. He said one of the issues was consistency across programs.

Ms. Weaver asked RAP members to identify their top issues. Members listed the following:

- Local government options
- Non-Bay area
- Trading
- Maximizing available credits
- Baselines and water quality
- Creating a predictable program
- Incentives for market participation
- Clear process that helps bring reductions to market
- Public transparency from start to finish
- How will it be paid for?
- Program that is workable for farmers
- Concern about how far credits can “travel outside the home watershed”
- Credit quality/certainty and ongoing verification of practice and performance baselines and additionality
- Credit certification
- Credit calculation methodologies
- Consistency in applying rules and ability to use Nutrient Credits (no local overrule)
- More adaptability for new technologies and practices to come into play
- Establishing Baselines
- Program to help achieve Bay Restoration goals by 2025

Discussion of Work Plan

Ms. Snead noted that there were four additional meetings planned: December 13, 2012, February 1, 2013; February 22, 2013 and March 20, 2013.

Mr. Baxter said that staff would develop a draft regulation and submit to the RAP for review. He said that staff would be meeting to determine a division of labor. He said the draft would incorporate comments and discussions from this meeting.

Ms. Snead said a technical team of staff from DCR and DEQ would be meeting throughout the process.

Ms. Snead said that the RAP had an aggressive schedule to cover in a short amount of time.

Ms. Snead said that the plan for the next meeting was to review an outline of what the regulation would look like.

Ms. Snead said that information from the meetings would be posted on the DCR website. Comments should be submitted to Ms. Snead and Ms. Vucci.

Public Comment

There was no public comment.

Adjourn

There was no further business and the meeting was adjourned.